CASE NO. 15-50881

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JILLIAN JOHNSON,
Plaintiff - Appellant,
v.

WORLD ALLIANCE FINANCIAL CORP.
AND REVERSE MORTGAGE SOLUTIONS, INC.,
Defendants - Appellees.

On Appeal from the United States District Court
For the Western District of Texas, San Antonio Division
Civil Action No. 5:14-CV-281

BRIEF OF APPELLEES WORLD ALLIANCE FINANCIAL CORP. AND REVERSE MORTGAGE SOLUTIONS, INC.

Mark D. Hopkins
Texas State Bar No.: 00793975
Hopkins Law, PLLC
12117 Bee Caves Rd., Suite 260
Austin, Texas 78738
Telephone: (512) 600-4320
Facsimile: (512) 600-4326
mark@hopkinslawtexas.com

Crystal G. Roach
Texas State Bar No. 24027322
Barrett Daffin Frappier
Turner & Engel, LLP
15000 Surveyor Blvd., Ste 100
Addison, TX 75001
Telephone: (972) 340-7901
Facsimile: (972) 341-0743
crystalr@bdfgroup.com

ATTORNEYS FOR APPELLEES WORLD ALLIANCE FINANCIAL CORP. AND REVERSE MORTGAGE SOLUTIONS, INC.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1.	Jillian Johnson	Plaintiff - Appellant
2.	Darby Riley Riley & Riley, Attorneys at Law	Counsel for Plaintiff - Appellant
3.	World Alliance Corp.	Defendant - Appellee
4.	Reverse Mortgage Solutions, Inc.	Defendant - Appellee
5.	Mark D. Hopkins Hopkins Law, PLLC	Counsel for Defendants - Appellees
6.	Crystal G. Roach Barrett Daffin Frappier Turner & Engel, LLP	Counsel for Defendants – Appellees
7.	Hon. Orlando L. Garcia	United States District Judge Western District of Texas
8.	Hon. Henry J. Bemporad	United States Magistrate Judge Western District of Texas

s/ Mark D. Hopkins
Mark D. Hopkins, Attorney for Appellees
State Bar No. 00793975

RECOMMENDATION ON ORAL ARGUMENT

Appellees World Alliance Corporation and Reverse Mortgage Solutions, Inc. suggest that the issues presented can be determined upon the record and that oral argument would not benefit the panel. The parties' positions are clear and the record uncomplicated. *See* Fed. R. App. P. 34(a)(3). If, however, the Court determines oral argument would be helpful, Appellees request the opportunity to participate equally in oral argument with Appellant.

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STATEMENT OF JURISDICTION

The District Court's jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. Plaintiff is a Texas resident. Defendant World Alliance Financial Corporation (hereafter "WAF") is a New York corporation and Defendant Reverse Mortgage Solutions, Inc. (hereafter "RMS") is a Delaware corporation. The amount in controversy, exclusive of costs and interest, exceeds $75,000.00.

The Final Judgment of the District Court was signed on August 26, 2015. (ROA. 950, 951). Appellant timely filed her Notice of Appeal on September 14, 2015. (ROA.952-953).

This Court has jurisdiction to entertain this appeal since it is an appeal of a final decision of a district court of the United States. *See* 28 U.S.C § 1291 (granting jurisdiction to courts of appeals over "final decisions" of district courts). The governing substantive law is that of the State of Texas.

STATEMENT OF THE ISSUES

1. Did the District Court Properly Determine that Appellant, as a matter of law, has no Private Cause of Action against WAF for the Alleged Violation of HUD Guidelines in Originating a Home Equity Conversion Mortgage?

2. Did the District Court Properly determine that Appellant's claim for Fraudulent Inducement failed a matter of law in the absence of any evidence of a material misrepresentation by WAF or RMS regarding the Home Equity Conversion Mortgage?

STATEMENT OF THE CASE

A. Statement of Facts.

Following their wedding, Appellant and her new husband Jay Johnson Sr. (hereafter "Jay Johnson" or "Decedent") sought to travel the world to find their "eternal spring." (ROA. 571). Unfortunately, what they left behind was Jay Johnson's third ex-wife (hereafter "Baker") who was angry over the state of her former husband's financial affairs.

Prior to his marriage to Appellant, Jay Johnson acquired and owned as his separate property certain real property commonly known as 123 Hudson Drive, Del Rio, Texas (hereafter "Property"). Jay Johnson obtained a Home Equity Conversion Mortgage ("HECM" or "reverse mortgage" with WAF (ROA. 697-714; ROA. 587-605) pledging the Property as collateral against the HECM a year prior to his marriage to Appellant Johnson. Prior to the origination of the reverse mortgage and in connection with his divorce, Jay Johnson granted Baker an owelty lien for $50,000.00, in the Property (to be paid if and when the Property was ever sold). (ROA. 715).

While Appellant and Jay Johnson were out of the country on their six-month honeymoon, Baker believing that the HECM triggered a default provision within her owelty lien, improperly foreclosed on the Property (ROA. 656-657). Baker next allegedly removed and/or destroyed items from the Property that were of

emotional significance to Appellant[1]. (ROA. 643).

In advance of Baker's improper foreclosure, Baker sent notice of the foreclosure to Jay Johnson. Jay Johnson communicated the threatened foreclosure to RMS. Jay Johnson then inquired with RMS of his obligation to pay taxes and insurance on the Property under the terms of the HECM in light of the threatened foreclosure, as well as his inquiry as to whether RMS would assist him in dealing with his third ex-wife's legal action against him in seeking to foreclose on her Owelty Lien. (ROA. 614). RMS responded that taxes and insurance remained Jay Johnson's responsibility under the HECM and that Jay Johnson should retain his own legal counsel if he sought representation against his ex-wife. (ROA. 617-618, 621).

In August of 2011, RMS filed suit against Baker in state district court, in an effort to protect RMS's interest in the Property vis-à-vis the claims of Baker. Judgment was ultimately granted in favor of RMS, whereby the foreclosure sale conducted by Baker was deemed to be invalid. (ROA. 656-657). During the pendency of Baker's lawsuit, Jay Johnson passed away in Guatemala.

For reasons unknown, and despite the Baker foreclosure being invalidated, Appellant never elected to move back into the Property after her return to the United States. Instead, Appellant filed this lawsuit against RMS and WAF, as

[1] Such as "the yellow rubber duckies" that Appellant valued at $50,000.00 because the ducks would float in her bubble bath drawn by Jay Johnson. (ROA. 575, 577).

opposed to Baker. (ROA. 8-14, 566-567). Appellant rationalizes and alleges that her damages, while brought about at the hand of Baker, would have been avoided if the reverse mortgage had never ben originated[2], as it was allegedly made in

[2] A timeline of relevant events is as follows:

a. **March 3, 2008**: In connection with the divorce between Johnson and Baker, a Deed of Trust and Special Warranty Deed with Encumbrance for Owelty of Partition (hereafter "Baker Lien") was executed with regard to the Property. (ROA. 715).

b. **April 16, 2008**: Pursuant to the divorce decree, Jay Johnson was awarded the Property.

c. **April 18, 2009**: Johnson obtained a home equity conversion mortgage loan (hereafter "HECM") with lender WAF as the beneficiary under the Security Instrument (hereafter "Deed of Trust"), which encumbered the Property. (ROA. 587-605, 697-714).

d. **April 1, 2010**: The HECM was assigned from WAF to RMS. (ROA. 604).

e. **November 20, 2010**: Jay Johnson and Plaintiff married.

f. **February 2011:** Johnson and Plaintiff began their six-month extended honeymoon traveling overseas.

g. **June 2011:** Johnson received Baker's demand letter threatening foreclosure.

h. **August 1, 2011**: In protecting its own legal interest in the Property against Baker, RMS filed suit against Baker in the 83rd District Court of Val Verde County, Texas attempting to stop and/or invalidate the foreclosure sale. That case is styled *Reverse Mortgage Solutions, Inc. v. Barbara Fran (Johnson) Baker and Jan London, Trustee* in the 83rd Judicial District of Val Verde County, Texas under Cause No. 29172 (hereafter "Baker Suit").

i. **August 2, 2011**: Baker conducted her unauthorized foreclosure sale of the Property.

j. **March 2012:** Jay Johnson and Appellant learned that the shed (located on the Property) containing their remaining personal property was allegedly broken into by Baker. (ROA. 564).

k. **November 30, 2012**: Jay Johnson died in Guatemala of a ruptured pancreas on his second wedding anniversary to Appellant. (ROA. 654).

l. **May 14, 2013**: The trial court in Val Verde County granted summary judgment in favor

violation of HUD Guidelines.

B. Course of Proceedings and Disposition in the Court Below.

Jillian Johnson (hereafter "Appellant" or "Johnson") filed suit against Reverse Mortgage Solutions, Inc. (hereafter "RMS") and World Alliance Financial Corporation (hereafter "WAF") asserting claims regarding the origination and servicing of a reverse mortgage obtained by her deceased husband (Jay Johnson). Suit was filed on March 27, 2014, in the United States District Court for the Western District of Texas, San Antonio Division. (ROA. 8-13).

In attacking the legal merit of Johnson's Original Complaint, RMS and WAF filed a Motion for Summary Judgment on March 20, 2015. (ROA. 547-659). Johnson attempted to avoid summary judgment by filing her First Amended Complaint.[3] (ROA. 660-670). RMS and WAF subsequently filed a Supplemental Motion for Summary Judgment, (ROA. 677-730), to address the new causes of action raised within Johnson's First Amended Complaint. Johnson then filed a Response (ROA. 731-885) to RMS's and WAF's Summary Judgment Motion and Supplemental Summary Judgment Motion.

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of RMS whereby invalidating and voiding Baker's foreclosure action. (ROA. 656-657).

m. **March 27, 2014**: Appellant filed this suit against Defendants alleging a violation of HUD regulations, breach of contract and violation of the Texas Debt Collection Practices Act.

[3] The First Amended Complaint asserted new causes of action for fraudulent inducement and promissory estoppel in addition to the breach of contract and Texas Debt Collection Act claims asserted within the Original Complaint.

On July 15, 2015, the Magistrate Judge issued a Report and Recommendation that RMS's and WAF's motion and supplemental motion for judgment be granted on the merits. (ROA. 886-903). Johnson filed Objections to the Report and Recommendation. (ROA. 909-922). On August, 26, 2015, District Judge Orlando L. Garcia adopted the Report and Recommendations of the Magistrate and Final Judgment was entered whereby disposing of all parties and all claims. (ROA. 950-951). Johnson subsequently filed a Notice of Appeal on September 14, 2015. (ROA. 952-953).

STANDARD OF REVIEW

The grant of summary judgment is reviewed *de novo* on appeal. See, *Wilcox v. Wild Well Control, Inc.*, 794 F.3d 531, 535 (5th Cir. 2015). Summary judgment is required "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A non-movant will not avoid summary judgment by presenting "speculation, improbable inferences, or unsubstantiated assertions." *Likens v. Hartford Life & Accident Ins. Co.*, 688 F.3d 197, 202 (5th Cir. 2012).

SUMMARY OF THE ARGUMENT

A. No Private Right of Action Exists for Violation of HUD Guidelines

The core of Appellant's claims against both WAF and RMS are rooted in Appellant's belief that Jay Johnson's Home Equity Conversion Mortgage ("HECM") violated HUD Guidelines for HUD insured HECM. At the time of closing of a HECM that is insured by HUD, HUD's suggested guideline to mortgagees is that other liens against a property should either be paid off or subordinated to the HECM prior to closing. The reason for HUD's guideline is simple; HUD wants insured HECM liens to be in first lien position compared to other liens against the property.

Appellant's claims fail as a matter of law. It is well established that HUD regulations address the relation between a mortgagee and the government. Violation of a HUD regulation does not give rise to a private cause of action by a mortgagor. As such, the District Court properly dismissed Appellant's claims for violation of HUD guidelines as no private cause of action exists for such claims.

Appellant's claims fail factually. Appellant's claims were also properly dismissed by the District Court as they fail factually. HUD guidelines specifically allow for subordinate liens to remain against a Property after closing. Herein, Baker's Owelty Lien (hereafter "Baker Lien" or "Owelty Lien") was subordinate to Jay Johnson's existing mortgage prior to the closing of the HECM. At closing

of the HECM, the HECM paid off the prior mortgage and became equitably subrogated to the prior mortgage. The result was that the Owelty Lien maintained its second lien position behind the HECM. The fact that Baker incorrectly surmised that her lien position had been negatively impacted by the HECM resulted in Baker conducting an invalid and void foreclosure sale (as was determined by a state district court). Baker also wrongfully acted in entering the Property and destroying the possessions of Appellant. WAF and RMS cannot be held liable for the improper wrongful conduct of Baker.

B. Appellant's Fraudulent Inducement Claim Fails as a Matter of Law

Appellant asserts that WAF fraudulently induced Jay Johnson to enter into a Home Equity Conversion Mortgage by misrepresenting the impact of the HECM on an existing owelty lien against the Property. In order to have a claim for fraudulent inducement, Appellant was required to introduce summary judgment evidence depicting that WAF made a representation, that the representation was material, and the representation was false. The summary judgment record is devoid of evidence depicting that WAF made any representation to Jay Johnson regarding the interplay between the HECM and the existing owelty lien. Even if a statement attributed to WAF had actually been made (that the HECM would not

negatively impact the lien priority of the owelty lien) the alleged statement is factually correct.

ARGUMENT AND AUTHORITIES

I. DID THE DISTRICT COURT PROPERLY DETERMINE THAT APPELLANT, AS A MATTER OF LAW, HAS NO PRIVATE CAUSE OF ACTION AGAINST THE MORTGAGEE FOR THE ALLEGED VIOLATION OF HUD GUIDELINES IN ORIGINATING A HOME EQUITY CONVERSION MORTGAGE?

A. No Private Cause of Action Exists for Violation of HUD Guidelines

Appellant alleges that HUD Guidelines required WAF to pay off Baker's Owelty Lien prior to origination of the HECM. Specifically, Appellant alleges that WAF failed to comply with HUD Guidelines (set out within Mortgagee Letter 2006-20[4], Mortgagee Letter 2009-49[5], and Handbook 4235.1, Section 4-2E[6]) in that at the time of closing of a HECM, HUD guidelines require other liens against

[4] U.S. Department of Housing and Urban Development letter dated August 16, 2006, to all FHA-approved mortgagees providing, "The Mortgagee letter clarifies and reiterates that under the Home Equity Conversion Mortgage (HECM) Program the Federal Housing Administration (FHA) permits existing liens to be subordinated to the first and second HECM Liens."

[5] Mortgagee Letter 2009-49 was issued on November 18, 2009. The HECM at issue herein closed on April 18, 2009, seven months before the Mortgagee Letter was issued. It defies logic as to how Defendants could be liable for failure to comply with a letter that did not exist at the time of closing.

[6] Section 4235.1, Section 4-2 E reads:

> The property need not be debt-free for the borrower to be eligible.
> 1) The indebtedness on an existing lien must be satisfied at closing or subordinated to the HECM mortgages.

the property to either be paid off or subordinated to the HECM. The reason for HUD's guideline is simple, HUD wants HECM liens it insures to be in first lien position compared to other liens against the property.

It is well established that the, "NHA[7] and the HUD[8] regulations promulgated thereunder deal only with the relations between the mortgagee and the government, and give the mortgagor no claim to a duty owed nor remedy for failure to follow." *Holloway v. Wells Fargo Bank, N.A.,* No. 3:12-CV-2184-G, 2013 WL 1187156, at *18 (N.D. Tex. Feb. 26, 2013). District courts have therefore refused to imply a private right of action for violations of HUD regulations. *Bassie v. Bank of America, N.A.*, 2012 WL 6530482, at *3-4 (S.D. Tex. 2012)("failure to comply with regulations of … "HUD" must be dismissed because those regulations … do not provide for a private cause of action."); *Denley v. Vericrest Fin., Inc.* 2012 WL 2368325 (S.D. Tex. 2012)(HUD regulations "do not create or provide a private cause of action for a mortgagor). *Roberts v. Cameron-Brown Co*., 556 F.2d 356, 360 (5th Cir. 1977)("no case was cited nor has our research uncovered any precedent for the proposition that a private cause of action exists to remedy a violation of this HUD regulation"); *Baker v. Countrywide Home Loans, Inc*., 2009 WL 1810336 (N.D. Tex. 2009) (Because the aim of the FHA and the HUD

[7] National Housing Act

[8] Department of Housing and Urban Development

regulations is to govern the relations between mortgagees and the government, courts have recognized that violations of such provisions fail to give rise to a private cause of action).

It is beyond dispute that the HUD guidelines at issue expressly allow for subordinated liens (such as Baker's Owelty Lien) to remain against a property.[9] But even if the guidelines prohibited subordinate liens, it is equally beyond dispute that there is no private right of action for failure to comply with HUD regulations promulgated under the National Housing Act (the "NHA"). *See, e.g. Hornbuckle v. Countrywide Home Loans, Inc.,* No. 02-09-00330-CV, 2011 WL 1901975, at *5 (Tex. App. – Fort Worth May 19, 2011, no pet.)(mem. op.)(holding that there is "no private right of action regarding any alleged failure by appellees to follow HUD regulations"); *see also Klein v. Wells Fargo Bank, N.A.*, No. A-14-CA-861-SS, 2014 WL 5685133, at *6 (W.D. Tex. Nov. 4, 2014) ("Even when the HUD regulations are supposedly incorporated into a deed of trust, courts have still found alleged violation of these regulations does not amount to a private cause of action." (citing *Hornbuckle,* 2011 WL 1901975, at *5)); *Mitchell v. Chase Home Fin. LLC*, NO. 3:06-CV-2099-K, 2008 WL 623395, at *3-4 (N.D. Tex. Mar. 4, 2008)(mem. op.); *Legette v. Washington Mut. Bank, N.A.*, No. 3:03-CV-2909-D, 2005 WL

[9] See text of Mortgagee Letter 2006-20, Mortgagee Letter 2009-49, and Handbook 4235.1, Section 4-2E set out within footnotes 4-6 infra.

2679699, at *5 (N.D. Tex. Oct. 19, 2005) (finding no private right of action notwithstanding referenced HUD regulations in note and deed of trust).

Simply put, black letter law provides that Appellant has no private cause of action against either WAF or RMS premised upon violation of HUD guidelines. Appellant's claim for breach of contract, premised upon WAF's and RMS's failure to comply with HUD Guidelines, therefore fails as a matter of law.

B. Appellant's Allegations Regarding HUD Violations Fail Factually.

Appellant argues that Decedent's Home Equity Conversion Mortgage triggered a default provision within Baker's Owelty Lien Deed of Trust, granted by Decedent to his third ex-wife whereby allowing Decedent's third ex-wife to *lawfully* foreclose on the Property. However, the HECM never affected the lien priority of the Owelty Lien and as such the third ex-wife's foreclosure of her Owelty Lien was wrongful and unlawful.

More specifically regarding the HECM and lien priority, the HECM paid off a prior mortgage on the Property that had been taken out by Decedent and his third-ex wife in 2001.[10] The payoff was $251,394.75. As such, the portion of the HECM (for $251,394.75) used to pay off the 2001 lien was equitably subrogated to the 2001 lien (as was recognized by court judgment). (ROA. 656-657). Nothing surrounding the payoff of the 2001 lien affected the priority of the Owelty Lien.

[10] Specifically, as reflected on the HUD-1, the HECM paid off the prior home equity loan in the amount of $251.394.75.

All that transpired upon the funding of the HECM was that the lender on the HECM became equitably subrogated to the 2001 lien in the amount used to pay off the 2001 lien. The third ex-wife even acknowledged the existence of the 2001 lien within the terms of the Owelty Lien Deed of Trust. (ROA. 716).

In analyzing the impact, if any, of the HECM on the Baker Owelty Lien, the 83rd District Court of Val Verde County, Texas determined that the origination of the HECM did not impact the lien priority of the Owelty Lien and as a result the foreclosure conducted by Baker was invalid and void. (ROA. 656-657). There simply is no factual merit to Appellant's assertion that WAF's or RMS's failure to comply with HUD regulations resulted in the origination of a HECM that triggered a default provision within Baker's Owelty Lien deed of trust.

Given the foregoing, the District Court properly dismissed Appellant's claims that WAF's alleged violation of HUD guidelines negatively impacted the lien priority of Baker's Owelty Lien. Appellant's allegations fail factually.

C. HUD Guidelines Were Not Expressly Incorporated into the HECM.

Appellant repeatedly suggests within her brief that HUD guidelines are "incorporated by reference"[11] into the HECM, or there exists "an implied

[11] See, Appellant's Brief at p. 13 ("HUD's acceptance of the reverse mortgage incorporates by reference the HUD regulations").

promise"[12] within the HECM to comply with HUD regulations. Appellant's analysis of the law on this issue simply does not match with past opinions from this Court. The Fifth Circuit has previously recognized that, "[f]ederal statutes and regulations can form the basis of a breach-of-contract claim **if** the parties expressly incorporate them into their contract." See, *Smith v. JP Morgan Chase Bank, N.A.*, 519 Fed. App'x 861, 864 (5th Cir. 2013)(emp. added). However, the Court in *Smith* held that the incorporation of federal statutes must be by specific terms, and only general reference is insufficient. *Id.* at 864; see also *Bassie v. Bank of America, N.A.*, No. 4:13-CV-00891, 2012 WL 6530482 at *4 (S.D. Tex. Dec. 13, 2012) (rejecting borrower's claim that alleged failure to comply with HUD regulation constituted a breach of the deed of trust); *Motton v. Chase Home Fin.*, No. H-10-4994, 2012 WL 2886718, at *4 (S.D. Tex. July 13, 2012) (same).

The Magistrate within his Report and Recommendation squarely focused on the issue of whether the HUD guidelines were incorporated by express terms within the HECM. The Magistrate observed, "[Appellant] does not identify – and the Court cannot find – any express mention of a HUD regulation or other federal statute in the deeds of trust." (ROA. 895). The Magistrate additionally provided that while the HECM generally incorporated Federal law, "These general provisions do not expressly incorporate HUD regulations." *Id; also see, Anderson*

[12] See, Appellant's Brief at p. 15 ("[T]he express terms of the reverse mortgage Deed of Trust contained an implied promise…").

v. Compass Bank, No. H-14-0410, 2014 WL 5468132, at *5 (S.D. Tex. Oct. 28, 2014)(determining that a "general reference to 'federal laws' in a Deed of Trust, on which Plaintiffs rely, is insufficient to support their breach of contract claim"); *Smith v. JPMorgan Chase Bank, N.A.*, 519 F. App'x 861 at 864 (same).

The District Court properly dismissed Appellant's claims premised her mistaken belief that HUD guidelines were incorporated into the HECM. As the Magistrate provides within his Report and Recommendation, "[Appellant] has not provided any other evidence that would suggest that the parties intended to incorporate HUD regulations in the contract. Absent such evidence, [Appellant] cannot maintain a breach-of-contract claim based on a violation of HUD regulations." (ROA. 896).

D. Borrower has the Contractual Burden to Maintain Lien Priority.

Appellant argues that it was WAF's and/or RMS's obligation to maintain the priority of Lender's lien on the property.[13] Appellant's argument is without merit. The Note refers to the "Borrower" maintaining "the priority of [the] Lender's lien on the Property." (ROA. 698). There simply is no requirement within the Note that WAF or RMS is to maintain the priority of the HECM lien, or any other lien.

[13] It defies logic how why Appellant would sue WAF or RMS over either WAF's or RMS's alleged failure to maintain the priority of their own lien. The only harm resulting from the mortgagee failing to maintain its own lien priority would befall the mortgagee and not the borrower.

In reviewing the express language of the HECM Deed of Trust, it is the borrower who is tasked with the burden of maintaining the lien priority of the HECM. The Deed of Trust provides, "Borrower shall promptly discharge any lien which has priority over this Security Instrument…" (ROA. 702-704). The Deed of Trust also provides that if Lender determines that any part of the Property is subject to a lien which may attain priority over the HECM, that Lender may give Borrower a notice identifying the lien and, "Borrower shall satisfy the lien or take [action] within 10 days….". *Id.*

The HECM is clear and unequivocal that it was Jay Johnson's obligation to insure that no lien or encumbrance attained priority of the HECM. To the extent the mortgagee ever determined that it's HECM lien was being jeopardized, then the lender could give Jay Johnson notice to remedy the issue.

Given the foregoing, the District Court properly concluded that Appellant failed to raise a genuine question of material fact on her breach of contract claim that WAF and RMS were required to maintain the lien priority of the HECM.

II. DID THE DISTRICT COURT PROPERLY DETERMINE THAT APPELLANT'S CLAIM FOR FRAUDULENT INDUCEMENT FAILED A MATTER OF LAW IN THE ABSENCE OF ANY EVIDENCE OF A MATERIAL MISREPRESENTATION BY WAF OR RMS REGARDING THE HOME EQUITY CONVERSION MORTGAGE?

Appellant amended her Original Complaint in an effort to avoid WAF's and RMS's summary judgment motion. (ROA. 660-670). The Amended Complaint asserts a claim for fraud in the inducement; the claim being that a WAF representative made a fraudulent misrepresentation (or fraudulent nondisclosure) to induce Jay Johnson to enter into the reverse mortgage.[14] The totality of evidence relied upon by Appellant in her Response to WAF's and RMS's Supplemental Motion for Summary Judgment (addressing the fraudulent inducement claim) is an email[15] from Jay Johnson to RMS sent two years after the actual closing of the HECM. In the email Jay Johnson recounts his thoughts about the Owelty Lien. Johnson's email reads in part,

> "When I made the application for the reverse mortgage, [WAF] representative Robert Blenna, copied here, and I addressed this factor [the Baker lien], which didn't seem to be an issue when I got the mortgage. Now, two years later, it seems to be." (ROA.613).

In recommending that Appellant's fraudulent inducement claim be dismissed, the Magistrate reasoned regarding the email,

> "As for Plaintiff's email, it is at best ambiguous as to whether Blennau himself made a statement that the Baker lien was not an issue, or whether Plaintiff considered it not to be an issue regardless

[14] RMS' in no way participated in the origination of the HECM. (ROA. 694). The first communication RMS had with Decedent was not until 2010**.** Simply stated, RMS cannot be liable for fraud with respect to the origination of the HECM as RMS had no communications with Decedent until after the origination of the HECM.

[15] Appellant also produced the title search document from Paradise Settlement Services which depicted that the title agent [Paradise] identified the existence of the Baker Owelty Lien in the local real property records.

> of whether an employee of World Alliance made an affirmative statement that it was not. Even if ambiguities are resolved in Plaintiff's favor, a single email – written two years after the fact – is insufficient to raise a genuine dispute of material fact, especially since it identifies neither who made a misrepresentation or what the misrepresentation was. Absent any evidence from Blennau, World Alliance, RMS, or elsewhere that an actual representation, much less a material misrepresentation, was in fact made concerning the Baker lien, Plaintiff's fraud in the inducement claim cannot go forward."

Fraudulent inducement is a subcategory of fraud that arises in the context of contracts. *Haase v. Glazner,* 62 S.W.3d 795, 798 (Tex. 2001). The elements of fraudulent inducement are the same as the elements for fraud, "plus an additional element that the fraud related to an agreement between the parties." *In re VNA Inc.*, 403 S.W.3d 483, 487 (Tex. App. – El Paso 2013, orig. proceeding). As reiterated by the Fifth Circuit less than three weeks ago, "Under Texas law, the elements of fraud are (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury." *Lawrence v. Federal Home Loan Mortgage Corporation*, 2015 WL 9245270 (5th Cir. 2015).

Appellant's fraudulent inducement claim requires Appellant to establish that WAF made a representation that was material, as well as that the representation

was false. *See, In re FirstMerit Bank,* 52 S.W.3d 749 (Tex. 2011). Appellant's *email* neither establishes that WAF made a representation nor that the representation was false. The *email* in no way reflects that Mr. Blennau made any statement, which less a false statement.

Even assuming that representations were made by WAF that the HECM would not affect the Owelty Lien by impacting the Owelty Lien's priority,[16] such a representation would be correct. The black letter terms of the Owelty Lien Deed of Trust acknowledge the existence of the prior 2001 lien which was obtained jointly by Decedent and Baker (ROA. 716). The black letter terms also include Decedent's obligation to, "preserve the [Owelty] lien's priority as it is established in this deed of trust." (ROA. 716). The chief question in the present litigation is then whether or not the HECM in any way bumped the Owelty Lien from remaining in a second lien position behind the 2001 lien. The short answer is that it did not.

Jay Johnson and Baker acknowledged the existence of the 2001 lien, and that the 2001 lien is a prior lien to the Owelty Lien. *Id.* Upon the funding of the HECM, the balance due and owing on the 2001 lien was $251,394.75, which sum was paid off by the HECM. (ROA. 837). As such, $251,394.75 of the HECM

[16] *See Plaintiff's Amended Complaint*, at para. 11. (ROA. 662-663).

became equitably subrogated to the 2001 lien. Equitable subrogation "is a legal fiction" whereby "an obligation, extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another." *First Nat'l Bank of Houston v. Ackerman,* 8 S.W. 45, 47 (Tex. 1888); *accord Smart v. Tower Land & Inv. Co.,* 597 S.W.2d 333, 337 (Tex.1980).

Equitable subrogation, "[E]ssentially allows a subsequent lienholder to take the lien-priority status of a prior lienholder. *First Nat'l Bank of Houston,* 8 S.W. at 46–47; *Murray v. Cadle Co.,* 257 S.W.3d 291, 299 (Tex. App.-Dallas 2008, pet. denied). Texas state courts view favorably upon protecting a party's rights through the doctrine of equitable subrogation. *See, Murray,* 257 S.W.3d at 299; *Interfirst Bank Dallas, N.A. v. U.S. Fid. & Guar. Co.,* 774 S.W.2d 391, 397 (Tex. App.-Dallas 1989, writ denied). As provided by the Texas Supreme Court,

> Texas has long recognized a lienholder's common law right to equitable subrogation. *See Benchmark Bank v. Crowder,* 919 S.W.2d 657, 661 (Tex.1996); ****619*** *Faires v. Cockrill,* 31 S.W. 190, 194 (Tex. 1895); *Oury v. Saunders,* 77 Tex. 278, 13 S.W. 1030, 1031 (1890). The doctrine allows a third party who discharges a lien upon the property of another to step into the original lienholder's shoes and assume the lienholder's right to the security interest against the debtor. *First Nat'l Bank of Kerrville v. O'Dell,* 856 S.W.2d 410, 415 (Tex.1993) (citing *Faires,* 31 S.W. at 194). The doctrine of equitable subrogation has been repeatedly applied to preserve lien rights on homestead property. *See, e.g., Benchmark,* 919 S.W.2d at 661; *Farm & Home Sav. & Loan Ass'n v. Martin,* 88 S.W.2d 459, 469–70 (Tex. 1935).

LaSalle Bank Nat. Ass'n v. White, 246 S.W.3d 616, 620 (Tex. 2007). The Texas Supreme Court went on to note that without the application of equitable subrogation lenders would be reluctant to refinance debt as was requested by Jay Johnson herein. "Without equitable subrogation, lenders would be hesitant to refinance homestead property due to increased risk that they might be forced to forfeit their liens. The ability to refinance provides homeowners the flexibility to rearrange debt…" *Benchmark,* 919 S.W.2d at 661.

There is no dispute that a valid 2001 lien existed against the Property. (ROA. 716). There is also no dispute that proceeds from the closing of the HECM were used to pay off the 2001 lien. (ROA. 837). A such, there is but one legal conclusion that $251,394.75 of the HECM was equitably subordinated to the 2001 lien. The Owelty Lien never changed in priority, it remained subordinate to the $251,394.75 amount it had always been behind. To the further extent Baker conducted an improper foreclosure sale of the Property based upon her flawed understanding of lien law, WAF and RMS cannot be held liable for such conduct.

Appellant failed to introduce summary judgment evidence of a material nature reflecting that WAF made any representation to Jay Johnson regarding the interplay between the HECM and the Owelty Lien, much less that any representation was false. For these reasons the District Court properly dismissed Appellant's claim for fraudulent inducement.

CONCLUSION

For the foregoing reasons, the District Court's judgment dismissing Appellant's claims against World Alliance Financial and Reverse Mortgage Solutions should be affirmed in its entirety.

Respectfully submitted,

HOPKINS LAW, PLLC
12117 Bee Caves Rd., Suite 260
Austin, Texas 78738
Telephone: (512) 600-4320
Facsimile: (512) 600-4326
mark@hopkinslawtexas.com

s/ Mark D. Hopkins
Mark D. Hopkins
Texas State Bar No. 00793975

BARRETT DAFFIN FRAPPIER
TURNER & ENGEL, LLP
Crystal G. Roach
15000 Surveyor Blvd., Suite 100
Addison, TX 75001
Telephone: 972-340-7901
Facsimile: 972-341-734
crystalr@bdfgroup.com

s/ Crystal G. Roach
Crystal G. Roach
Texas State Bar No. 24027322

ATTORNEY FOR APPELLEES
World Alliance Financial Corp. and
Reverse Mortgage Solutions, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been sent via facsimile on this 9th day of January 2016 to the parties listed below.

Darby Riley
Riley & Riley Attorneys at Law
320 Lexington Avenue
San Antonio, Texas 78215-1913
(210) 225-7236 – Telephone
(210) 227-7907 – Facsimile

s/ Mark D. Hopkins
Mark D. Hopkins

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

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